IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2689 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BATUKBHAI R SARVAIA

Versus

COMMISSIONER

Appearance:

MR YV SHAH for Petitioner

MR JR NANAVATI for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL

Date of decision: 08/12/2000

ORAL JUDGEMENT

By means of filing this petition under Article 226 of the Constitution, the petitioner has prayed to issue an appropriate writ, order or direction to quash and set aside order dated May 19, 1988 passed by the

Commissioner, Bhavnagar Municipal Corporation, Bhavnagar by which the petitioner's services as probationer drainage sub-inspector came to be terminated.

2. The petitioner is a resident of Bhavnagar city. He was initially recruited as a daily wager in June, 1978. His services along with the services of other 31 daily wagers were terminated with effect from June 30, 1979. Therefore, the petitioner and other employees had raised an industrial dispute regarding validity of termination of their services. The dispute was referred to Labour Court, Rajkot for adjudication. The Labour Court, Rajkot in LCR Nos. 670/79 and 653/80 passed an award on September 16, 1982 and directed the respondents to reinstate all the workmen including the petitioner to their original posts with continuity of service, but without backwages. Pursuant to the award of the Labour Court, the petitioner was reinstated as cleaner on daily wages by an order dated September 5, 1983,which is produced at Annexure-A to the petition. According to the petitioner, the respondent- Corporation had failed to comply with the directions given by the Labour Court in the award and, therefore, the workmen through their Union had approached the High Court by way of filing Special Civil Application No. 2720/85. The said petition was placed for hearing before a Division Bench and the Division Bench had disposed of the petition on August 5, 1985 in the following terms :-

"Coram : N.H.Bhatt & I.C.Bhatt, JJ.)

Mr. Nanavati, replying on the affidavit filed today states that every endeavour would be made to pay the dues as early as possible but in no case later than 30th September, 1985. Whatever back wages due under the award on reinstatement will be paid from the due date. Mr. Zaveri also without going into incities, agrees gracefully that the concerned workman will give a certificate about their having or having not earned anything during the period of calculation. In view of this solemn assurance resting on the affidavit also, Mr. Zaveri withdraws this petition. Petition stands disposed of as withdrawn.

5.8.85."

Thereafter selection for the posts of drainage sub-inspector was notified by the respondent-Corporation and the petitioner had applied for the said post. On being selected, the petitioner was appointed as drainage

sub-inspector by an order dated April 4, 1985, a copy of which is produced at Annexure-E to the petition. It may be stated that initially the petitioner was appointed on probation for a period of six months and it is an admitted fact that the probation period was extended by the competent authority from time to time. The petitioner has mentioned that the last order extending his probation period was passed on March 21, 1988. As the petitioner apprehended termination of his services, he had instituted Special Civil Application No.1219/88, in which the respondentCorporation through its learned counsel had stated that after completion of departmental inquiry pending against the petitioner, appropriate order would be passed and, therefore, the petitioner had sought permission to withdraw the petition and the petition was accordingly disposed of. The petitioner has claimed that extension of probation period from time to time was illegal, as he was appointed as drainage sub-inspector pursuant to resolution No.82 dated January 13, 1985, which was passed by the Standing Committee and, therefore, on completion of probation period, he should have been confirmed on the post which he was holding. According to the petitioner, the Commissioner of the respondent- Corporation by an order dated May 19, 1988 terminated his services as probationer drainage sub-inspector which is illegal. The said order is produced by the petitioner at Annexure-I to the petition. What is averred by the petitioner is that the said order has been passed by way of punishment and punishment could not have been imposed on him without holding inquiry. Under the circumstances, the petitioner has filed present petition and claimed relief to which reference is made earlier.

3. Mr. Dilip B.Dave, Inquiry Officer, Bhavnagar Municipal Corporation, Bhavnagar has filed reply affidavit controverting the averments made in the petition. In the reply affidavit, reference has been made to two misconducts which were committed by the petitioner and it is pleaded that as work of the petitioner was not found to be satisfactory, his services as probationer drainage sub-inspector were terminated. After referring to the fact that the petitioner had committed misappropriation regarding the amount to be paid to Safai Kamdars as well as one Godi Raja and Maniben Bijal, what is emphasized is that the whole material was examined by the competent authority to find out whether the petitioner should be confirmed or his services should be terminated and as the order has been passed after careful consideration of the record,the petition should be dismissed. The petitioner has filed

rejoinder affidavit and reiterated what is stated by him in the petition. By filing the rejoinder, the petitioner has stated that having regard to the facts of the case, prayer made in the petition should be granted.

4. Mr. Y.V.Shah, learned counsel for the petitioner submitted that the averments made in Paras 1.3 and 1.4 of the reply affidavit would indicate that according to the respondent, the petitioner had committed misconducts and, therefore, his services as probationer drainage sub-inspector were terminated by an order dated May 19, 1988 and as the order has been passed by way of punishment without holding any inquiry, the petition should be accepted. The learned counsel produced copy of Approval Application No.8/88 filed in Reference RT/183/86 by the respondent under section 33(1)(b) of the Industrial Disputes Act, 1947 seeking approval to the order of punishment of termination of services of the petitioner dated May 19, 1988 and submitted that even according to the respondent, order dated May 19, 1988 is passed by way of punishment and, therefore, the said order should be set aside, as no inquiry was held against the petitioner before imposing punishment for so-called misconducts. In support of his submissions, learned counsel placed reliance on (i) Dipti Prakash Banerjee v. Satvendra Nath Bose National Centre for Basic Sciences, Calcutta and others, AIR 1999 SC 983, and (ii) V.P.Ahuja v. State of Punjab & Haryana and others, AIR 2000 SC 1080.

5. Mr. A.R.Thakker, learned counsel for the respondent-Corporation submitted that the impugned order is order terminating services of the petitioner simpliciter and, therefore, the petitioner is not entitled to the reliefs claimed in the petition. The learned counsel emphasized that no stigmatic words are used in the impugned order and as services of the petitioner were no longer needed, respondent was entitled to terminate the services of the petitioner as probationer drainage sub-inspector, which action cannot be treated as illegal. The learned counsel pointed out that in past also the petitioner had committed misconducts regarding which punishments were imposed on him and as the said fact is not disputed by the petitioner, the petition should be dismissed.

6. I have heard the learned counsel for the parties and taken into consideration the documents forming part of the petition. It is true that in the impugned order it is mentioned that services of the petitioner as probationer drainage sub-inspector were terminated, as

his services were no longer required. However, in Paras 1.3 & 1.4 of the reply affidavit,following averments have been made on behalf of the respondent-Corporation :

"1.3 I say that the petitioner obtained amount from Municipal Treasury which was to be paid to Safai Kamdarss as leave encashment and that the petitioner instead of paying the entire amount, deducted Rs. 100/- from each Safai Kamdar and appropriated the same. I say that the Safai Kamdars made complaint in respect of the aforesaid unlawful misappropriation by the petitioner of RS. 100/- from each Safari Kamdar. I say that Kanu Damji gave a detailed statement and supported the complaint made by the other Safai Kamdars. Annexed hereto and marked as annexure-III is the copy of the complaint made by one of the Safai Kamdars dated 15th September, 1987 and annexure-IV is the copy of the statement made by Kanu Damji.

1.4 I say that the petitioner obtained money from Municipal Treasury for paying to Safai Kamdars under Food Loan Scheme. The petitioner did not pay the amount to Godi Raja and Maniben Bijal. The aforesaid employees made complaint in respect of non-payment and on the complaint being made, the petitioner deposited the said amount in the Treasury on 19th September, 1987. Annexed hereto and marked annexure-V collectively are the copies of the said complaints made by Godi Raja and Maniben Bijal dated 17th September, 1987 and 19th September, 1987."

The averments made in the above referred to paragraphs make it manifest that certain misconducts alleged to have been committed by the petitioner with reference to payment to be made to Safai Kamdars and other employees have been taken into consideration by the respondent. Moreover, the fact that the respondent-Corporation had submitted approval application under section 33(1)(b) of the Industrial Disputes Act, 1947 is not in dispute. The application submitted by the respondent-Corporation under section 33(1)(b) of the Industrial Disputes Act, 1947 before the Industrial Court, Rajkot would indicate that even according to the respondent-Corporation itself, the impugned order dated May 19, 1988 was not an order terminating services of the petitioner simpliciter, but was passed by way of punishment and, therefore, the respondent had sought approval of the Court as required by the provisions of section 33(1)(b) of the Industrial Disputes Act, 1947.

The averments made in the reply affidavit read with the facts mentioned in application submitted by the respondent-Corporation under section 33(1)(b) of the Industrial Disputes Act, 1947, make it abundantly clear that though the impugned order is prima-facie an order terminating services of the petitioner simpliciter, but in fact, it has been passed by way of punishment. In Dipti Prakash Banerjee (supra), the Supreme Court had occasion to examine following points :-

(i) In what circumstances, the termination of a probationer's services can be said to be founded on misconduct and in what circumstances could it be said that the allegations were only the motive ?
(ii) When can an order of termination of a probationer be said to contain an expression ?
(iii) Can the stigma be gathered by referring back to proceedings referred to in the order of termination ?

After reviewing the law on the point, the Supreme Court has made following pertinent observations in Paras 20 & 21 :-

"20. As to in what circumstances an order of termination of a probationer can be said to be punitive or not depends upon whether certain allegations which are the cause of the termination are the motive or foundation. In this area, as pointed out by Shah,J. (as he then was) in Madan Gopal v. State of Punjab, AIR 1963 SC 531, there is no difference between cases where services of a temporary employee are terminated and where a probationer is discharged. This very question was gone into recently in R.S.Gupta v. U.P.State Agro Industries Corporation Ltd. (1998)8 JT (SC) 585 : (1999 AIR SCW 207) and reference was made to the development of the law from time to time starting from Parshottam Lal Dhingra v. Union of India, 1958 SCR 828: (AIR 1958 SC 36) to the concept of 'purpose of inquiry' introduced by Shah, J. (as he then was) in State of Orissa v. Ram Narayan Das (1961)1 SCR 606 : (AIR 1961 SC 177) and to the seven Bench decision in Samsher Singh v. State of Punjab (1974)2 SCC 831 : (AIR 1974 SC 2192) and to post Samsher Singh case-law. This court had occasion to make a detailed examination of what is the 'motive' and what is the 'foundation' on which innocuous order is based.

21. This Court in that connection referred to the principles laid down by Krishna Iyer, J. in Gujarat Steel Tube v. Gujarat Steel Tubes Mazdoor Sangh, (1980)2 SCC 593 : (AIR 1980 SC 1896). As to 'foundation', it was said by Krishna Iyer,J. as follows (Paras 53 and 54 of AIR) :

".....a termination effected because the master is satisfied of the misconduct and of the desirability of terminating the service of the delinquent servant, it is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case, the grounds are recorded in different proceedings from the formal order, does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the inquiry and proceeds to terminate. Given an alleged misconduct and a live nexus between it and the termination of service, the conclusion is dismissal, even if full benefits as on simple termination, are given and non-injurious terminology is used."

and as to motive :

"On the contrary, even if there is suspicion of misconduct, the master may say that he does not wish to bother about it and may not go into his guilt but may feel like not keeping a man he is not happy with. He may not like to investigate nor take the risk of continuing a dubious servant. Then it is not dismissal,but termination simpliciter,if no injurious record of reasons or pecuniary cut-back on his full terminal benefits is found. For, in fact, misconduct is not then the moving factor in the discharge"

As to motive one other example is the case of State of Punjab v. Sukh Raj Bahadur, (1968)3 SCR 234 : (AIR 1968 SC 1089, where a charsge memo for a regular inquiry was served, reply given and at that stage itself the proceedings were dropped and a simple termination order was issued. It was held, the order of simple termination was not founded on any findings as to misconduct. In that case, this

> Court referred to A.G.Benjamin v. Union of India (Civil Appeal No.1341 of 1966 dt. 13.12.1966)(SC) (reported in 1967(15) Fac LR 347), where a charge memo was issued, explanation was received, an inquiry officer was also appointed but before the inquiry could be completed, the proceedings were dropped and a simple order of termination was passed, the reason for dropping the proceedings was that 'departmental proceedings will take a much longer time and we are not sure whether after going through all the foundation, we will be able to deal with the accused in the way he deserves'. The termination was upheld."

From the decision of the Supreme Court in the case of Dipti Prakash Banerjee (supra), it is evident that as to in which circumstances an order of termination of a probationer can be treated to be punitive depends upon whether certain allegations which are the cause of the termination are the cause of motive or foundation and stigmatic words need not be contained in order of termination itself. Again, in V.P.Ahuja (supra) the Supreme Court has ruled that failure in performance of duties of an employee -administratively and technically cannot be made ground for terminating services without complying with the principles of natural justice. In the said case, services of the probationer were terminated on the ground that he had failed in performance of his duties - administratively and technically. While allowing the appeal of the employee, the Supreme Court has ruled that order ex-facie was stigmatic as also punitive because the order was founded on the ground that the employee had failed in performance of his duties administratively and technically and the services could not have been terminated without holding regular inquiry and giving an opportunity of hearing to the employee. Applying the principles laid down by the Supreme Court in the above-referred to two decisions, I find that the misconducts which are referred to in Paras 1.3 & 1.4 of the reply affidavit, are foundation for passing the impugned order. The fact that the impugned order has been passed by way of punishment is admitted by the respondent-Corporation which is quite evident from the averments made by it in the application which was submitted under section 33(1)(b) of the I.D.Act, 1947. It is well settled that before imposing any penalty for misconduct, an inquiry must be held against an employee and he should be afforded an opportunity of defending himself. Admittedly, in the present case, no inquiry was held, nor any opportunity of hearing was afforded to the petitioner before passing the impugned order. As the

impugned order has been passed in contravention of the principles of natural justice, the same is liable to be set aside. As the impugned order is liable to be set aside, the petitioner is entitled to be reinstated in service on his original post. However, the question arises as to whether the petitioner is entitled to backwages. The record of the petition indicates that pursuant to the order passed by the Court, the petitioner is employed on lower post and is gainfully employed. Moreover, as mentioned in the reply affidavit, the petitioner has committed serious misconducts, two of which are admitted by the petitioner himself. Having regard to the facts of the case and more particularly the fact that the petitioner has not discharged duties on the post on which he is going to be reinstated, the petitioner cannot be granted backwages in view of the principle 'no work no pay'.

For the foregoing reasons, the petition partly succeeds. Order dated May 19, 1988 passed by the respondent-Corporation by which services of the petitioner as probationer drainage sub-inspector were terminated, is hereby quashed and set aside. The respondent is directed to reinstate the petitioner on his original post with continuity of service, but without backwages as early as possible and preferably within two months from the date of receipt of the writ. Rule is made absolute accordingly,with no order as to costs.

(J.M.Panchal,J.)

(patel)